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IN THE

Supreme Court of the United States

October Term 1968

No. [redacted] 65

TIMOTHY F. LEARY,

Petitioner,

against

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Writ	7
As to Question I	7
As to Question II	10
As to Question III	12
As to Question IV	14
As to Question V	15
APPENDIX A—Opinion of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court	1a
APPENDIX B—Opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for a Rehearing	35a
APPENDIX C—Judgment of the United States Court of Appeals for the Fifth Circuit	39a
APPENDIX D—Constitutional and Statutory Provisions Involved	40a
APPENDIX E—Correspondence between the United States Attorney and Counsel for Petitioner	42a

Citations

PAGE

CASES:

Brady v. *Maryland*, 373 U.S. 83 (1963) 11

Chapman v. *California*, 386 U.S. 18 (1967) 10

Giles v. *Maryland*, 386 U.S. 83 (1963) 11

Grosso v. *United States*, 390 U.S. 39 (1968) 2, 7, 8

Haynes v. *United States*, 390 U.S. 62, 1968 ..... 2, 7, 8

In Re Grady, 39 Cal. 912 (1964) 15

Levin v. *Katzenbach*, 363 F. 2d 287 (D.C. Cir. 1966) 11

Marchetti v. *United States*, 390 U.S. 85 (1968) 3, 7, 8

People v. *Woody*, 40 Cal. 69 (1964) 15

Russell v. *United States*, 369 U.S. 749 (1962) 13

Sherbert v. *Verner*, 374 U.S. 398 (1963) 15

Constitutional and Statutory Provisions

AMENDMENT I TO UNITED STATES CONSTITUTION ... 1, 3

AMENDMENT V TO UNITED STATES CONSTITUTION . 1, 3

18 U.S.C. § 4208(b) 2

21 U.S.C. § 176a 2, 3, 4, 5, 9, 14

26 U.S.C. § 4741(a) 2, 3, 7

26 U.S.C. § 4742(a) 2, 3, 7

26 U.S.C. § 4744(a) 2, 3, 4, 7

28 U.S.C. § 1254(1) 2

IN THE

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No. .....

TIMOTHY F. LEARY,

Petitioner,

against

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 29, 1967.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A, pages 1a-34a), is reported at 383 F.2d 851 (1967); its opinion denying Petitioner's application for rehearing (Appendix B, pages 35a-38a) has not yet been officially reported. The Court of Appeals affirmed the judgment of the District Court for the Southern District of Texas, Laredo Division. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 29, 1967, (Appendix C, page 39a). On October 20, 1967, an application was made for rehearing. The application was denied in a decision dated March 29, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner has been convicted and sentenced to a maximum prison term of 30 years and fined $40,000, subject to the provisions of 18 U.S.C. § 4208(b), for offenses relating to Petitioner's alleged possession of less than one-half ounce of marihuana (Transcript* 640-44). Specifically, Petitioner was found guilty of violating 21 U.S.C. § 176a (unlawfully and knowingly transporting illegally imported marihuana, with intent to defraud, with knowledge of illegal importation) and 26 U.S.C. § 4744(a)(2) (unlawfully and knowingly transporting marihuana, as a transferee required to pay the transfer tax, without having paid such tax (Tr. 44, 45, 637-638)).

The questions presented herein are:

I. Whether the registration and tax provisions in 26 U.S.C. Sections 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *U.S.*, 390 U.S. 39 (1968); *Grosso* v. *U.S.*, 390 U.S. 62 (1968); and *Haynes* v. *U.S.*, 390 U.S. 85 (1968).

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* References to Transcript will hereafter be noted as Tr.

II. Whether the basic rights of due process and fair trial under the Fifth Amendment were denied by the prosecution's non-disclosure that its sole rebuttal witness was under two federal indictments at the time of trial, while the prosecution obstructed discovery thereof on cross-examination of the witness; vouched for his credibility; and, sought to discredit Petitioner's entire testimony on the basis of the rebuttal witness' testimony.

III. Whether Petitioner was denied his basic right to a fair trial by the conduct of the District Court in propounding, for the first time in its charge, theories of criminal liability markedly different from those upon which the prosecution and the defense relied throughout the trial.

IV. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof.

V. Whether in view of the evidence presented as to Petitioner's religious beliefs, the application to him of the Federal Statutory provisions here involved constitutes an unconstitutional impairment of his religious liberty guaranteed by the First Amendment to the United States Constitution.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the United States Constitution (Amendments I and V) and Statutes of the United States (21 U.S.C. § 176a; 26 U.S.C. §§ 4741, 4742 and 4744) are set forth in Appendix D, at pages 40a-41a.

Statement

The conviction of Petitioner and the substantial jail sentence he faces arise out of a round-trip automobile journey lasting less than one hour, across the International Bridge connecting Laredo, Texas with Mexico (Tr. 70, 71, 315). Specifically, the testimony upon the trial disclosed that Petitioner, on December 22, 1965, had driven, with four passengers south across the International Bridge to the Mexican Customs Station and, without leaving the Station, and after apparently being denied entry, returned northward across the bridge (Tr. 74, 137-38, 315-328). Petitioner was stopped at the American Customs Station on his return and he and the other passengers, including his eighteen year old daughter were thoroughly searched (Tr. 74-75, 109, 331-333). Sweepings of marihuana were found in the rented automobile and a small quantity was found on the person of Petitioner's daughter. A total of less than one-half ounce of marihuana was thus discovered (Tr. 81, 82, 90, 109, 177, 184-5).

Petitioner was charged with violating 21 U.S.C. § 176a and 26 U.S.C. § 4744(a)(2). The indictment charged him with smuggling marihuana as well as with the illegal transportation thereof.

Upon trial, the District Court, over the prosecution's objection withdrew the charge of smuggling, it being clear that no evidence was presented to justify an inference that Petitioner had acquired the small quantity of marihuana during his short stay in the Mexican Customs Station.

It was urged on behalf of Petitioner that the same reasoning applicable to the dismissal of the smuggling count, i.e., his lack of importation of marihuana, should serve to compel the withdrawal of the transportation charge. The District Court, however, in its charge to the jury, and over Petitioner's timely objection, (Tr. 613-14) took the position

that Petitioner's testimony that he had knowingly possessed marihuana during the trip to Mexico, together with the illegal importation presumption, under 26 U.S.C. § 176a, arising from mere possession, formed a sufficient basis for conviction (Tr. 607-08, 610).

Testimony was introduced through Petitioner and other witnesses, including expert witnesses, with respect to Petitioner's religious beliefs and his use of marihuana as a part thereof (Tr. 267-312, 402-18, 422-34). The District Court, however, despite Petitioner's request therefor (Tr. 617), refused to charge that, assuming the sincerity and honesty of Petitioner's belief and use of marihuana in connection therewith, such religious beliefs would serve to constitute a defense to the crimes charged (Tr. 527-28).

In connection with the presumption of illegal importation which arises solely from the possession of marihuana, Petitioner had specifically denied importing the small quantity of marihuana and denied any knowledge that it was imported marihuana (Tr. 349). In addition to urging the basic unfairness and incriminatory nature of the statutory presumption contained in § 176a, Petitioner also attempted to show the arbitrary and irrational nature of said presumption through testimony showing the quantity of domestically grown marijuana as opposed to imported marihuana. The District Court, however, refused to allow any detailed testimony bearing on this point (Tr. 165, 517) and denied Petitioner's timely motion (based, in part, on the irrationality of the presumption) for a directed verdict of acquittal on the transportation count (Tr. 492).

As an attack upon Petitioner's attempt to rebut the presumption and upon the sincerity of his religious beliefs, the prosecution called as its sole rebuttal witness one Cutler, who directly contradicted Petitioner's testimony relating to the occasions upon which he used marihuana (Tr. 449-50). The prosecution, in summation, relied heavily

upon Cutler's testimony to argue to the jury that Petitioner's credibility had been completely impeached and that Petitioner's entire testimony should be disregarded (Tr. 543-45, 548). Petitioner's testimony that he did not know the source of the marihuana (Tr. 349) if believed would alone have led to his acquittal.

However, the prosecutor did not disclose until November 25, 1966, eight months after the judgment of conviction, that Cutler was, at the time of the trial: (a) under indictment in the United States District Court for the Southern District of California for smuggling approximately 25 pounds of marihuana and 50 dexedrine capsules into the United States from Mexico; (b) under indictment in the same court for bail jumping in connection with the smuggling charge; and (c) subject to a bench warrant previously issued by the United States District Court for the Southern District of California for his arrest in both of the above matters. (A copy of the correspondence between Counsel for Petitioner and the United States Attorney relating to the aforesaid pending indictments against Cutler is annexed as Appendix E, pages 42a-45a.)

In addition to the non-disclosure of this vital impeachment information, the prosecution made repeated reference in its closing argument to Cutler's testimony as an unqualified demonstration that the jury "would be justified in rejecting everything . . . that [Petitioner] testified to from the witness stand" (Tr. 543). (See also Tr. 548, 580-581.) It argued in its closing:

> "Now, they didn't even attack the testimony of this witness, Cutler. They could have but they didn't. *We submit that it's the truth*; if it wasn't the truth it would have been attacked. *There is no reason to disbelieve this man*—no *motivation* for him to falsify or no bad feelings toward Dr. Leary. He just testified to the *facts*, which are that they were smoking marihuana in Greenwich Village before he went to India. And all this other stuff, I submit, is just hogwash . . ." (Tr. 544-545) (Emphasis added).

The prosecution compounded its non-disclosure by affirmatively obstructing the discovery of such information by the defense by a seemingly innocent objection to the question: "How many times have you been picked up for smoking marihuana?" (Tr. 462). The Court sustained this objection and defense counsel went on to inquire as to conviction of a felony, which was denied by the witness.

Finally, Petitioner had asserted that the registration and tax provisions contained in 26 U.S.C. Sections 4741(a) and 4742, upon which the charge of violating Section 4744 (a) (2) was predicated, violated his constitutional privilege against compulsory self-incrimination (Tr. 651).

REASONS FOR GRANTING WRIT

As to Question I

With respect to the constitutionality under the Fifth Amendment of the registration and tax provisions in 26 U.S.C. 4741(a) and 4742, it is submitted that the decision below conflicts directly with this Court's recent decisions in *Marchetti* v. *U.S.*, 390 U.S. 39 (1968); *Grosso* v. *U.S.*, 390 U.S. 62 (1968); and *Haynes* v. *U.S.*, 390 U.S. 85 (1968). These cases, involving determinations as to the self-incriminatory nature of similar registration and tax provisions relating to wagering and possession of firearms, had not been decided at the time the Court of Appeals for the Fifth Circuit originally rendered its decision. On reargument, however, these decisions were specifically called to the attention of the Court of Appeals. That Court sought to distinguish these cases, on the ground that the existence of certain circumstances under which the possession of marihuana might not be unlawful relieves that statute of its incriminatory nature. (See Opinion denying Rehearing at Appendix B, Pages 36a-38a.) Petitioner respectfully sub-

mits, however, that the Court of Appeals' reliance upon the apparent fact that pharmacists and physicians may lawfully possess marihuana in Texas is misplaced. This Court in the *Marchetti, Grosso* and *Haynes* cases, nowhere implied that the admittedly self-incriminatory nature of a statutory provision when applied to a particular defendant may be sanctioned because of the existence of exceptions which would allow other classes of individuals to comply with the statute without incriminating themselves. Rather, the burden of these three decisions is directly contrary. Indeed, this Court in *Haynes* appears to have considered and rejected the distinction raised by the Court of Appeals:

> "It is true, as the United States emphasizes, that registration is not invariably indicative of a violation of the Act's requirements: there are situations, which the United States itself styles 'uncommon', in which a possessor who has not violated the Act's other provisions is obliged to register. Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will susbtantially increase the likelihood of his prosecution. Moreover, he can reasonably fear that the possession established by his registration will facilitate his prosecution under the making and transfer clauses of § 5851. In these circumstances, it can scarcely be said that the risks of criminal prosecution confronted by prospective registrants are 'remote possibilities out of the ordinary course of law'. *Heike* v. *United States,* 227 U.S. 131, 144; yet they are compelled, on pain of criminal prosecution, to provide to the Secretary both a formal acknowledgement of their possession of firearms, and supplementary information likely to facilitate their arrest and eventual conviction. The hazards of incrimination created by the registration requirement can thus only be termed 'real and appreciable'. *Reg.* v. *Boyes,* 1 B. & S. 311, 330; *Brown* v. *Walker,* 161 U.S. 599—600." 390 U.S. at 96-97.

Further, the Court of Appeals attempted to distinguish the present situation by asserting that Petitioner's testimony, explaining his possession and use of marihuana in defending himself against all counts of the indictment, amounted to a waiver of his privilege against self-incrimination (Appendix B, page 38a). In the circumstances of this case, such a distinction is totally untenable. If the opinion of the Court of Appeals is allowed to stand then any person charged under indictments similar to those under which Petitioner was tried becomes faced with an insoluble dilemma: on the one hand he is required to testify as to the facts surrounding his possession of marihuana in order to rebut the presumption of illegality arising from mere possession under § 176a; on the other hand if he does so testify, following the Court of Appeals reasoning, this very act of defending himself against that crime amounts to a waiver of his constitutional rights with respect to the charges growing out of the registration and tax provisions. In short, by the simple expedient of having multiple counts in the indictment, the constitutional privilege is effectively destroyed. This thoroughly unconscionable result must follow if the argument of waiver in the decision below is allowed to stand.

The importance of a ruling by this Court upon the self-incrimination issue as applied to narcotics prosecutions cannot be minimized: narcotics cases represent a large portion of federal criminal prosecutions. It is in such cases, particularly, that a defendant usually faces the double dilemma counts of tax liability and illegal transportation (or smuggling).

Finally, it must be emphasized that the constitutional infirmity here affects Petitioner's conviction under both counts of the indictment. It colored the entire conduct of the trial and the charge to the jury. The incriminatory nature of the registration and tax provisions appear inextricably tied to the similarly self-incriminatory effect of seeking to rebut the statutory presumption under § 176a.

As to Question II

Initially, it is submitted that this Court, as part of its overall supervisory obligations with respect to the administration of federal criminal justice, should condemn the conduct of the prosecution in connection with its rebuttal witness Cutler and should reverse the decision below—even if no prejudice be demonstrated. See *Chapman* v. *California*, 386 U.S. 18 (1967) and the cases collected therein. There is, as Mr. Justice Harlan in his dissent there noted:

> "... a recognition that certain types of official misbehaviour require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct. E.g. *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (prosecutorial misconduct)." *Id* at 52, note 7.

Alternatively, the error here was by no means "harmless". In view of the statutory presumption, the question of Petitioner's credibility was in no sense "peripheral" but was the central issue of the case. It was up to the jury to decide whether to believe Petitioner in his attempt to rebut the presumption of illegality. This attempt was met by the prosecution's use of the rebuttal witness, Cutler. The prosecution in its closing chose to cast the case as a credibility contest between Cutler and Petitioner:

> "Now, I say to you has he explained it to your satisfaction? We have proved to you that he didn't tell you the truth about how to use marihuana [sic]. We have impeached him and I submit you should disregard his testimony that he has not [sic] explained it to your satisfaction." (Tr. 548).

The impropriety here was exacerbated by the prosecution itself affirmatively vouching for the witness:

> "Now, they didn't even attack the testimony of this witness, Cutler. They could have but they didn't. *We submit that it's the truth;* if it wasn't the truth it would have been attacked. *There is no reason to disbelieve this man*—no *motivation* for him to falsify or no bad feelings towards Dr. Leary . . ." (Tr. 544-545) (Emphasis Added)

The jury "would be justified in rejecting everything . . . [Petitioner] testified to from the witness stand" (Tr. 543). The prosecution also prevented discovery of the vital impeachment evidence during cross-examination of Cutler (Tr. 462).

Cutler was a man then and there subject to immediate arrest and prosecution which could result in his incarceration, for not less than five years without parole and as long as most of the remaining years of his life.

It is submitted that the Court of Appeals opinion here in so lightly dismissing the impact of these improprieties places that Court at variance with other courts (e.g., *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966)) and militates against the increasing concern shown by this Court over conduct by Federal prosecutors inimical to a fair trial. See *e.g. Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1963).

As to Question III

This question involves the definition of a fair trial and of the role of the judge vis-a-vis the prosecutor in federal criminal trials. The issue arises out of the theory upon which this case was prosecuted and the application of that theory to an indictment that was fortuitously broad. The prosecution consistently throughout the trial relied, with respect to all counts of the indictment, upon the theory that the marihuana had been illegally imported from Mexico into Texas (Tr. 524, 526, 349, 354, 387-89).

The defense was twice denied a bill of particulars as to whether the prosecution was basing its case on possession and transportation prior to entering Mexico or from Mexico into Texas (Tr. 25-26, 41-42). The prosecution's case in chief consisted of six witnesses, none of whom testified on direct examination to any transaction other than Petitioner's return from Mexico. On this basis, defense counsel elicited the fact that Petitioner admitted that he had acquired the marihuana in New York prior to his trip to Mexico (Tr. 155). The prosecution's cross-examination of Petitioner and his witnesses sought to prove that the marihuana had been acquired in Mexico (Tr. 349, 354, 387-389).

Petitioner testified that he acquired the marihuana in New York (Tr. 313); drove from New York through Laredo, Texas, across the International Bridge, to the Mexican Customs Station (Tr. 315). Petitione was told that he would not then be given entry papers and would have to return the next morning (Tr. 321). Petitioner started back across the bridge, believing that there was no marihuana in the automobile at that time (Tr. 322-326). Just prior to reaching the United States Custom Station, Petitioner realized they would "have to go through customs on the American side" and asked "Is all of the marihuana out of the car?" His daughter replied "No, that the marihuana had just been

found and that she had it" (Tr. 328). In closing, defense counsel contended that Petitioner thus did not have the *mens rea* required for conviction when entering the United States from Mexico (Tr. 552-560).

At the close of the trial, the prosecution reaffirmed that:

> "Our theory is that this a bridge case. . . . They were caught at the bridge coming in from Mexico . . . and the only evidence to show that he had it before he left the country is his own testimony. The jury has the right to reject that in its entirety, as we plan to argue that they should" (Tr. 524).

The trial judge, however, in his charge gave no weight to the prosecution and defense theory predicated upon the Mexico to Laredo trip and directed the jury's attention almost exclusively to Petitioner's testimony:

> "to the effect that at all times from New York to New Orleans to Laredo, during the stops at the AAA station and prior to entering Mexico, by his own admission, as I understood his testimony, he had the marihuana in his possession; he knew he had it in his possession; he knew it was in violation of the laws of the United States . . ." (Tr. 607).

This pointed charge coupled with his charge excluding in substance all defenses raised by the Petitioner and his repeated emphasis of the presumptions, left the jury with little or no choice except to convict Petitioner on the judge's last-minute north-south theory (Tr. 587-615).

This Court, under its supervisory powers, should make clear that the orderly administration of federal criminal justice requires that the theory of criminal liability to be defended against be fixed at the early stages of the trial, either by a bill of particulars or by the prosecution in its case-in-chief, and not by the court after both sides have rested. That there may be other facts which, purely by calendar-coincidence, would support conviction under a theory

not urged by the prosecution, should in no way alter the requirements that a conviction for a major crime be predicated upon evidence supporting beyond a reasonable doubt the theory of wrongdoing consistently urged by the prosecution. Petitioner's defense was predicated upon the prosecution's theory and he was substantially prejudiced by the trial judge's subsequent reversal of theory.

More is here involved than the mere switching of theories of criminality engaged in by the prosecution and condemned by this Court in *Russell* v. *U.S.*, 369 U.S. 749 (1962). Here there was a confusion in role as between the trial judge and the prosecutor as well as a reversal in theory. Under the circumstances of the case, this is a matter peculiarly within the supervisory function of this Court.

As to Question IV

The presumption in § 176a, which authorizes a jury to find that marihuana has been illegally imported with knowledge of the defendant solely on the basis of his possession thereof, involves two issues. Firstly, whether the existence of such a presumption with the concomitant compulsion upon the defendant to explain his possession, serves to deprive the defendant of his protection against incrimination. Secondly, whether the presumption created in § 176a is, in light of present knowledge and as applied to the circumstances of this case, reasonable or arbitrary. The petitioner sought to offer evidence to put in issue the rationality of presuming that any particular quantity of the ubiquitous marihuana weed was grown outside of the United States. This offer was rejected (Tr. 165, 517).

As to Question V

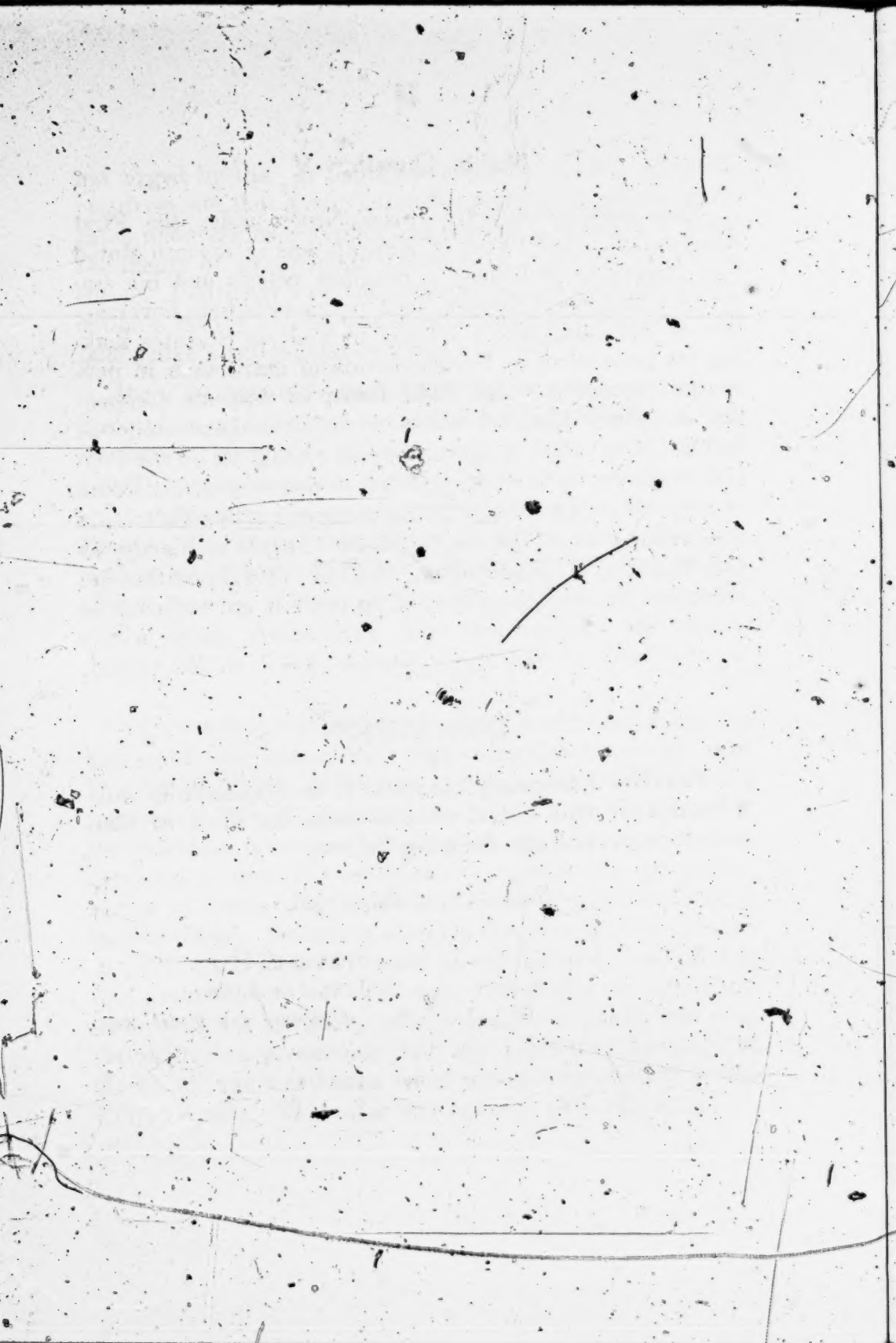
This question directly raises issues under the First Amendment. The Court of Appeals has in essence stated that, accepting Petitioner's religious beliefs and his sincerity with respect thereto, such religious beliefs nevertheless do not constitute a defense to Federal Statutes making his possession or transportation of marihuana in pursuance thereof a crime. The Court of Appeals (Appendix A, pages 12a-17a) chose to balance these religious rights against what it saw as an evil combatted by the Federal Statutes. It is submitted that in this respect the Court of Appeals is in conflict with the decisions of the California Supreme Court on the use of peyote (*People* v. *Woody*, 40 Cal. 69 (1964); *In Re Grady*, 39 Cal. 912 (1964)) and that the balancing done by the Court of Appeals is not sufficient to justify the infringement upon Petitioner's rights within the standards of *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

ROBERT J. HAFT,
JOEL JAY FINER,
Counsel for Petitioner.



APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(September 29, 1967.)

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

AINSWORTH, Circuit Judge: This unusual criminal case delves into the new realm of psychedelic experience, and into mysticism, religion and its free exercise. The principal issue we must decide is whether the conviction of appellant for violations of federal criminal statutes relating to marihuana—a psychedelic drug which the defendant claims he uses as a religious sacramental aid—contravenes the accused's First Amendment right to the free exercise of his

religion. There are, however, other important questions, some of them constitutional also, which we will discuss fully.

Dr. Timothy Leary, appellant, and his minor daughter, Susan Leary, age 18, were jointly indicted on three counts for offenses pertaining to marihuana. Dr. Leary was tried before a jury on March 11, 1966. Count 1, which charged the smuggling of marihuana into the United States which should have been invoiced (declared), was dismissed by the court following a motion for judgment of acquittal. Dr. Leary was found guilty, however, on Count 2, which charged transportation, and facilitation of transportation, and concealment of marihuana after importation,[1] in violation of 21 U.S.C. § 176a,[2] and on Count 3, which

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[1] Count 2 of the indictment reads as follows:

> "*Count Two.* That on or about December 22, 1965, in the Laredo division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, hereinafter called defendants, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three (3) ounces of Marihuana (Cannabis Sativa), more or less, after importation, and the defendants then and there knew the said Marihuana to have been imported into the United States contrary to law, in violation of Section 176(a), Title 21, United States Code."

[2] 21 U.S.C. § 176a provides:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

charged transportation and concealment of marihuana by defendants as transferees, required to pay the transfer tax imposed by the Internal Revenue Code,[3] in violation of 26 U.S.C. § 4744(a)(2).[4] Appellant was sentenced to the maximum penalties and fines provided for such of-

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

(No suspension of sentence, probation or parole is allowed as to a conviction for this offense. See 26 U.S.C. § 7237(d).)

[3] Count 3 of the indictment reads as follows:

"Count Three. That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, transferees, required to pay the transfer tax imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code."

[4] 26 U.S.C. § 4744(a)(2) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

"Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or [h]is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

26 U.S.C. § 7237 provides for a maximum fine of $20,000 and imprisonment of ten years for a first offense in violation of 26 U.S.C. § 4744(a)(2).

The rate of the special tax on marihuana is provided for in 26 U.S.C. § 4741. The written order form required of the transferee of marihuana is set forth in 26 U.S.C. § 4742.

fenses, subject, however, to the provisions of 18 U.S.C. § 4208(b), and was ordered committed to the medical center at Springfield, Missouri, for a complete study[5] to be

[5] 18 U.S.C. § 4208 provides in pertinent part that

> "(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. * * *
>
> "(c) Upon commitment of a prisoner sentenced to imprisonment * * * the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary."

The court ordered that the sentences imposed be consecutive and the fines cumulative (amounting to a total of 30 years and $40,000). The district judge of course is awaiting the outcome of this appeal, and upon our affirmation, under the provisions of 18 U.S.C. § 4208(b) may, in his discretion, reduce the term of imprisonment or place the appellant on probation under Count 3 and reduce the sentence of imprisonment under Count 2.

However, conviction under 21 U.S.C. § 176a requires a mandatory sentence of five years, and under 26 U.S.C. § 7237 there can be no suspension of sentence or probation for such conviction.

used by the court as a basis for determining the ultimate sentence in the case. Defendant's motion for a new trial was denied.

Susan Leary was tried at the same time as her father, Dr. Leary, by the court without a jury (trial by jury having been waived) and found guilty on Count 3 of the indictment but not guilty on Counts 1 and 2. Imposition of sentence was suspended and she was placed on probation during the remainder of her minority, without supervision, under the provisions of the Youth Corrections Act, 18 U.S.C. § 5010(a). Her appeal was then dismissed on her own motion.

The facts of this case are relatively uncomplicated.

Dr. Leary left New York on December 20, 1965 by automobile, accompanied by his two children, Susan, age 18, and John, age 16, and two other persons. Their destination was Yucatan, Mexico, and the alleged purpose of the trip was a Christmas vacation for the Leary children and to provide Dr. Leary the opportunity to write a book and to prepare for a summer session to be conducted with a research group at his home in Millbrook, New York. On December 22, 1965, Dr. Leary and the four passengers drove across the international boundary at Laredo, Texas, into the Republic of Mexico, stopped at the Mexican immigration station for several minutes, and turned back toward the United States. At approximately 6:45 p.m., they arrived at the secondary inspection area, Laredo International Bridge, Laredo, Texas. Dr. Leary, the driver of the vehicle, told a U. S. Customs official that they had driven across the boundary into Mexico within the prior hour, that they had been unable to secure tourist permits and had been told by Mexican immigration officials to return the following morning at 8:00 a.m. at which time the necessary Mexican permits would be given to them. The U. S. inspector asked the group if they had anything to declare from Mexico and was told that they had not. After the occupants alighted from the vehicle, the U. S. inspector

observed some vegetable material and a seed on the floor of the automobile which appeared to him to be marihuana. Thus the five travelers were arrested. A search of the baggage, the vehicle and of the individuals was made. Sweepings from the car floor and glove compartment were later proved to be marihuana.[6] While Dr. Leary was being searched, he stated that he had never used marihuana. A woman Customs inspector performed a personal search of the two female travelers, which resulted in the finding of a small metal container on the person of Susan Leary after she had disrobed. Within the container were three partially smoked marihuana cigarettes, a small quantity of semi-refined marihuana and capsules of detroamphetamine sulfate (said to be a nonprohibitive narcotic). Demand was made of Dr. Leary for the required Treasury Department transferee form. He stated that he had no such form. Susan Leary, in response to the same demand, refused to make any statement. Dr. Leary admitted to a U.S. Customs agent that the metal box taken from his daughter, Susan, containing the marihuana, was his property. He further stated in the presence of two Government agents that he knew more about narcotics and marihuana than either of them.

Dr. Leary testified on his own behalf. He admitted that the seized marihuana had been obtained by him in New York and had been in his possession continuously on his trip from New York to Laredo; that he had neither obtained an order form nor paid a transfer tax for the marihuana as required by the statute. He said that he asked the four people in his group to get rid of the marihuana; that just prior to arriving at the U.S. Customs Station, while crossing the International Bridge, he asked if the marihuana had been disposed of and was told by Susan, his daughter, that it had not been and it was in her

[6] The indictment refers to three ounces of marihuana. Analysis and weighing of the seized material disclosed that a total of a little less than one half of an ounce had been found and confiscated.

possession. He further admitted that while on the trip from New York to Mexico at an overnight stop in New Orleans, Louisiana, he smoked marihuana to relieve a low spiritual state; that this incident was equivalent to an hour of silent meditation from which he derived spiritual benefit. Dr. Leary testified that he was familiar with the laws of the United States relative to marihuana and was aware that his actions were contrary to such laws.[7] In his testimony he attempted to justify use of this drug which he said was for religious and scientific purposes.

Dr. Leary has an impressive academic background. He testified that he received a Ph. D. degree in Clinical Psychology from the University of California. During the years from 1944 to 1960 he wrote and published several publications relative to the use of psychedelic drugs in the treatment of the mentally ill, including thirteen scientific articles and two books. In 1950 he helped found the Kaiser Psychiatric Clinic in Oakland, California. During the next eight years he received nearly one-half million dollars in federal grants at the Kaiser Clinic for research work on mental illness. He published four diagnostic tests relative to mental illness which have been used in diagnosing and treating mental patients in over 750 clinics and hospitals in the United States and which have been translated into several foreign languages. He served on the University of California medical faculty from 1953 to 1956. In 1959 he joined the Harvard University faculty.

In 1960, while visiting Mexico, he testified that he had "the most intense religious experience" he had ever had in his life as the result of having eaten a number of the "Sacred Mushrooms" of Mexico. The incident changed

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[7] Dr. Leary was questioned by the court as follows:

"The Court: I take it that you make—that you do not deny that you have recognized all the time that the transportation and the use, and so forth, of this marihuana is contrary to the laws of the United States?

"The Witness: Yes, sir. I know they are contrary to the laws of the United States."

his life. Since that time he has written five books and thirty-eight articles pertaining to religious and scientific use of psychedelic drugs, and he has devoted his life to attempting to understand the religious experience and how it can be applied to help others. He said that he formed a religious research group after returning to Harvard University, and with the help of Aldous Huxley, he experimented with certain psychedelic drugs. In 1962 he studied Hinduism and after a year became a member of a Hindu sect. In 1963 he left Harvard, performed further experimental work in Mexico, and later established a center and workshop for religious and scientific research in Millbrook, New York, which center is now his home. The building also serves as a place for religious meditation and spiritual retreat. Rooms in the house contain shrines devoted to Hindu, Buddhist and Christian ways of finding God, as well as religious pictures and statues. Dr. Leary has traveled extensively through Asia in pursuit of his religious endeavors and has studied Buddhism and Hinduism with several religious teachers and monks. While studying in India with Sri Asoke Fukir, a religious leader, Dr. Leary participated in religious rituals in which marihuana was used. He was converted to Hinduism, and is now a member of the Brahmakrishna sect in Massachusetts.

Dr. Leary further testified that he first used marihuana in August or September 1964. Marihuana enables him to attain what he describes as the third level of consciousness. Other psychedelic drugs take a person to a higher level. According to the Hindu religion, there are thousands of roads to illumination to the god within a person. Different sects specialize in different aids. The Hindu sect in India of which he became a member uses marihuana for religious illumination and meditation. He ordinarily uses marihuana less than once a week and then only for religious purposes. He draws no distinction between his religious beliefs and his scientific experimentation. If he could not use marihuana it would not affect his religious beliefs but he would

consider it a violation of those beliefs and practices if he were denied its use.

Dr. Leary said he acquired the marihuana in New York which led to his conviction. He testified that the reason he did not declare the marihuana at the U.S. Customs Office at Laredo was his apprehension of being subjected to investigation or arrest. He never complied with the Treasury Department regulations relative to marihuana because he knew that he could not obtain permission for its use inasmuch as his research is not performed in a laboratory and is of a religious nature; that the law makes no provision for the use of marihuana under such circumstances; that if he had attempted to register or to pay the required tax, the marihuana would have been taken from him and he would have been subjected to legal action. He had applied for and been refused permits for other chemicals such as mescaline, peyote and LSD. He believes he has both a moral and a political right to possess marihuana.

Fred Swain (Sri Kalidas, in religion) testified on behalf of appellant. He is an American Hindu Sanyasa (monk), a renunciant, living in a monastery, who joined the religious order of which appellant is a member in 1948. He met Dr. Leary in 1962 and later participated in psychedelic experiments with him at Harvard University. While traveling in India he was often in the company of Dr. Leary; he smoked marihuana with him in the Rishikesh, a city of holy men, along the banks of the Ganges River, in Hindu religious services. He said that marihuana plays a very important part in the rituals of the Hindu sect conducted by Sri Asoke Fukir in India. The Brahmakrishma sect in the United States of which he and Dr. Leary are members is a highly established authority sect in India, recognized throughout India by all Hindus. He admitted that he was partially able to achieve and practice his religious beliefs in the Hindu sect without the use of marihuana. He does not use marihuana in the United States because it is unavailable; he is forced to use other psychedelic drugs in conjunction with meditation and prayer.

Dr. Ralph Metzner, a psychopharmacologist who received his Master's degree from Oxford and Ph. D. in Psychology from Harvard, testified on behalf of appellant. He co-authored with Dr. Leary the book "Psychedelic Experience" as well as several articles including "Reducing Criminal Behavior" by the use of the psychedelic drug psilocybin (the extract of the sacred mushroom). The word "psychedelic" refers to a class of drugs, which includes LSD, mescaline, marihuana, among others, whose primary effect is to expand consciousness, heighten intellectual activity and sensory awareness. In India he was initiated into the same Hindu sect of which Dr. Leary is a member. He participated with Dr. Leary in several scientific experiments under the auspices of Harvard University. He also assisted Dr. Leary in conducting seminars, giving lectures, writing books and giving training courses in consciousness expansion without drugs. He corroborated Dr. Leary's testimony concerning the religious nature and character of the Millbrook center in New York.[8]

Appellant's points of error are stated substantially as follows:

1 (A). The District Court erred in refusing to instruct the jury to acquit appellant if it found his religious claims to be honest and in good faith.

1 (B). In light of the federal exemption from restrictive legislation granted to religious users of peyote and the Government's inability to establish that marihuana is more harmful than peyote, the denial of a religious exemption from the marihuana legislation is an invidious religious discrimination in violation of the First and Fifth Amendments.

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[8] Out of the presence of the jury Dr. Metzner testified at length that marihuana was a mild, relatively harmless and non-addictive drug. Dr. Joe Fort, medical doctor with special training in psychiatry and drug addiction, also testified out of the presence of the jury substantially to the same effect.

2. Denial of appellant's motions for a bill of particulars specifying the location, direction and time of alleged transportation was reversible error; alternatively, the indictment was fatally insufficient.

3. The District Court's instructions on the meaning of the statutory presumptions (a) effectively directing conviction and imposed upon appellant the burden of proving his innocence; (b) were misleading and authorized convictions if appellant did not prove to the jury's "satisfaction" that his possession was "lawful" and "legitimate"; and (c) failed to direct acquittal if the jury believed that appellant lacked knowledge of illegal importation—all in violation of the Fifth and Sixth Amendments and amounting to "plain error" under Rule 52(b), Fed. R. Crim. P.

4. The Government's closing argument to the jury far exceeded the bounds of fair comment.

5. The Government's failure to disclose that one of the major witnesses was under two federal indictments at the time of the trial denied appellant a fair trial.

6. The presumption under 21 U.S.C. § 176a that marihuana is illegally imported and that a possessor has knowledge of illegal importation is arbitrary and irrational in view of the high proportion of marihuana in the United States which is domestically grown.

7. The statutory requirement of a written order form (26 U.S.C. § 4742) and the imposition of a transfer tax (26 U.S.C. § 4741(a)) violate appellant's constitutional privilege against compulsory self-incrimination and render invalid the conviction under Count 3.

8. The District Court erred in refusing to instruct the jury that they could consider as a defense to Count 2, the defendant's honest and sincere belief that he had a right to

engage in his activities because of his religious, scientific, or parental beliefs, and that these beliefs could negate the specific intent necessary for conviction under the statute.

Religious freedom, guaranteed by the Constitution, must be weighed with the public interest and the broad power to legislate vested in Congress by the Constitution.[9] Thus the First Amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. State of Connecticut*, 310 U. S. 296 (at 303, 304), 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The freedom to act is conditional and relative and Congress may prescribe and enforce certain conditions to control conduct which may be contrary to a person's religious beliefs in the interest of the public welfare and protection of society. See the Supreme Court's decisions in the anti-bigamy cases, *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244 (1878); *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890), and the Sunday-closing-law cases, *McGowan v. State of Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Two Guys From Harrison-Allentown v. McGinley*, 366 U. S. 582, 81 S. Ct. 1135, 6 L. Ed. 2d 551 (1961); *Braunfeld v. Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961); *Gallagher v. Crown Kosher Super Mkt. of Mass.*, 366 U. S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961).

In *Reynolds v. United States, supra*, 98 U. S. at 166, the Supreme Court, in denying Mormons an exemption from anti-bigamy laws, said, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." The Court recognized that religious practice could not be accepted as justification for an overt criminal act; that to permit a man to excuse his unlawful practices

[9] See Art. I, Sec. 8, United States Constitution; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 at 1390 (1967).

because of his religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (98 U. S. at 167.)

In *Braunfeld* v. *Brown, supra,* which upheld the constitutional validity of a Pennsylvania Sunday-closing statute, the Court reaffirmed the principles of *Cantwell* v. *State of Connecticut, supra,* and *Reynolds* v. *United States, supra,* with its statement that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions" (366 U. S. at 603), and that "legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." (366 U. S. at 603, 604.)[10]

Congress has seen fit to legislate, with appropriate criminal sanctions, concerning the possession, importation, concealment, and taxation of marihuana. The severity of the penalties provided by statute for the violation of these laws provides an insight into the grave concern of Congress to control the use of this drug. The testimony of appellant's witnesses relative to his sincerity of purpose in his religious and scientific endeavors is not pertinent here; nor is the evidence about the so-called harmless nature, the therapeutic value, and the accepted use of marihuana for religious rituals by certain sects in India.

Our concern is with the laws of the United States, which appellant admittedly, knowingly and purposely violated because they conflicted with his personal religious beliefs and practices. Appellant has attempted to demon-

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[10] See also *Davis v. Beason,* 133 U. S. 333, 342-343, 10 S. Ct. 299, 33 L. Ed. 637 (1890), in which the Supreme Court said: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

strate that the experience he finds through the use of marihuana is the essence of his religion. We do not inquire into the truth or verity of appellant's religious beliefs—to do so would be violative of the Free Exercise Clause of the First Amendment. *United States* v. *Ballard*, 322 U. S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). But appellant's religious creed and the sincerity of his beliefs are not at issue here. The district judge properly refused an instruction to the jury that they should acquit the defendant if they found his religious practices were in good faith.

Appellant's reliance on *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts. In *Sherbert* the Supreme Court held that the disqualification of a member of the Seventh Day Adventist Church for unemployment benefits under the South Carolina Unemployment Compensation Act, because of her refusal to work on Saturday, imposed a burden on the free exercise of her religion. The Court in arriving at its conclusion considered whether there was "some compelling state interest" in the statute which justified "the substantial infringement of appellant's First Amendment right" (374 U. S. at 406), and found no such state interest.

Here the paramount Government interest in the enforcement of the laws relative to marihuana is the protection of society. We cannot reasonably equate deliberate violation of federal marihuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits. The Court in *Sherbert*, while upholding the Free Exercise Clause under the facts of that case, recognized that it had rejected challenges under the same clause "to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even

when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U. S. 599, 603, 81 S. Ct. 1144, 1146, 6 L. Ed. 2d 563. The conduct or action so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643; Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645; Cleveland v. United States, 329 U. S. 14, 67 S. Ct. 13, 91 L. Ed. 12." (374 U. S. at 403.)

The unlawful transportation, possession and use of marihuana falls within the category of cases cited in *Sherbert* which require governmental regulation. "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" *Davis* v. *Beason*, 133 U. S. 333, 345, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

There is no evidence in this case that the use of marihuana is a formal requisite of the practice of Hinduism, the religion which Dr. Leary professes. At most, the evidence shows that it is considered by some as being an aid to attain consciousness expansion by which an individual can more easily meditate or commune with his god. Even as such an aid, it is not used by Hindus universally.

Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless. Thus the question is whether the conduct or action so regulated and prohibited under severe criminal penalties by Congress (i.e., trafficking in marihuana) has posed "some substantial threat to public safety, peace or order," *Sherbert, supra*, 374 U. S. at 403. Congress has demonstrated beyond doubt that it believes marihuana is an evil in American Society and a serious threat to its people. It would be difficult to imagine the harm which

would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, "turn on," is the "in" thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.

Appellant argues that the religious use of peyote, a psychedelic hallucinogen, by Indians who are members of the Native American Church has been constitutionally protected by the Supreme Court of California in *People* v. *Woody,* 40 Cal. 69, 394 P. 2d 813 (1964). He refers also to the California Supreme Court's decision in *In Re Grady,* 39 Cal. 912, 394 P. 2d 728 (1964), decided the same day as *Woody,* in which conviction of a "self-styled peyote preacher" for unlawful possession of narcotics, namely, peyote, was annulled and a new trial granted in order that the defendant might have an opportunity to prove that his use of peyote was in connection with an honest and bona fide practice of a religious belief. By parity of reasoning he contends that marihuana, another psychedelic drug, is entitled to the same constitutional protection as peyote. With due deference to the California Supreme Court, we are of course not bound by its decisions. However, we note an essential difference between *Woody* and the instant matter in that peyote in the *Woody* case played "a central role in the ceremony and practice of the Native American Church, a religious organization of Indians," and that the "ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion." Grady was apparently the spiritual leader of a group of

individuals and provided peyote for the group which he said was for religious purposes.

We are not impressed that the California cases are directly in point, and we will not apply them insofar as the circumstances of this case are concerned.[11]

In the early case of *State* v. *Big Sheep*, 243 Pac. 1067 (1926), the Montana Supreme Court held, "It was clearly within the power of the Legislature to determine whether the practice of using peyote is inconsistent with the good order, peace, and safety of the state," against the contention that the defendant's religious freedom was infringed.

In *State* v. *Bullard*, 267 N. C. 599, 148 S. E. 2d 565, 569 (1966), the North Carolina Supreme Court held, "The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here—in law nor in morals."

The District Court denied appellant's request for a bill of particulars which sought information to ascertain whether it was the Government's intention to rely on his possession of marihuana prior to entry into Mexico or following importation into the United States from Mexico, and whether it was the Government's contention that he was guilty of the overt act of smuggling. The smuggling

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[11] The Federal Commissioner of Food and Drugs has exempted peyote from use in bona fide religious ceremonies of the Native American Church. 21 C.F.R., Part 166.3(c). But this would hardly justify our holding, as appellant contends, that the criminal statutes against marihuana are unconstitutional because of religious discrimination. The exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana by any person who claims he is using it as a religious practice.

count was withdrawn from the jury by the court so we turn our attention to Count 2, which charges appellant with transportation and concealment of marihuana after knowledge of importation, and Count 3, which charges transportation and concealment without having paid the necessary transfer tax. Appellant stated that the information requested was necessary to prepare an adequate defense and to avoid the possibility of double jeopardy. Appellant further contended that depending on the theory of the prosecution, different legal defenses would arise, and the requested information was necessary to decide whether he should exercise his right to testify. From a reading of Counts 2 and 3 we conclude that they are not duplicitous. Each count states the date and the place of the offense and adequately apprises appellant of the nature of the offense charged. Granting or denial of a bill of particulars is a matter within the sound discretion of the trial judge, and will not be interfered with on appeal unless there is abuse or prejudice. *Joseph* v. *United States*, 5 Cir., 1965, 343 F. 2d 755; *Robertson* v. *United States*, 5 Cir., 1959, 263 F. 2d 872; *Johnson* v. *United States*, 5 Cir., 1953, 207 F. 2d 314. There was no such abuse or prejudice here.

Appellant contends, alternatively, that the indictment in this case is fatally insufficient. In this Circuit's decisions in *Thomas* v. *United States*, 314 F. 2d 936 (1963), and *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (1963), the defendants were charged with smuggling marihuana and with transportation of the drug without having paid the necessary tax thereon. Proof was adduced by the Government that the marihuana had been obtained by the defendants in Mexico. The court held in *Thomas*, and reiterated in *Marquez-Anaya*, that an indictment charging transportation and concealment of marihuana without having paid the transfer tax was necessarily predicated upon the defendants having obtained the drug within the United States, and because of the Government's proof to the

contrary, that is, that the marihuana had been smuggled by the defendants into the United States from Mexico, the conviction under the tax count could not stand. However, the instant matter is clearly distinguishable from our holdings in *Thomas* and *Marquez-Anaya*. Here, as the case developed, the Government's evidence (through testimony of United States Customs Agent Hatch of statements made to him by the accused) showed that the marihuana was acquired by defendant in the United States. Dr. Leary's own testimony later in the trial was to the same effect and the district judge consequently withdrew the smuggling count from the jury's consideration. The defendant admitted all of the elements of Count 2 except knowledge of importation. The Government, supported by appellant's own testimony, proved the elements of transportation and concealment of the drug under Count 2, although under the statute it was incumbent on it merely to show possession in order to authorize conviction unless the defendant explained his possession to the satisfaction of the jury. Appellant admitted transporting the marihuana from New York and crossing and recrossing the international border between the United States and Mexico with the marihuana in his possession. He made no effort to explain his possession of the illegal drug to the jury beyond his defense that use of marihuana was a sacramental aid in the practice of his religion—an explanation we have already pointed out is insufficient and immaterial. In addition to the facts proved by the Government, conviction on Count 3 was also justified by appellant's own testimony—his candid admission that he had never paid the required tax as a transferee. The counts were, therefore, neither inconsistent within themselves nor with each other.

There is likewise no merit to appellant's argument that the court's instructions implied that possession, not satisfactorily explained, *compelled* conviction. The court assiduously avoided such an instruction. At the outset the trial judge explained the presumption of innocence which at-

taches to every defendant brought to trial in a criminal case. He instructed the jury that the Government must prove the accused's guilt beyond a reasonable doubt and defined that term. The district judge quoted the exact provision of the statutory inference in 21 U.S.C. § 176a, i.e., "such possession shall be deemed sufficient evidence as to *authorize* conviction unless the defendant explains his possession to the satisfaction of the jury," (emphasis added), and explained its meaning in the language of the statute by stating: "That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana he had." The court clearly and adequately defined the terms "unlawfully," "knowingly," and "with intent to defraud" and twice repeated the necessity of the jury finding such elements beyond a reasonable doubt to warrant conviction. The jury was advised of its affirmative duty to acquit in the absence of such findings. We do not construe the court's instructions as *requiring* conviction on evidence of possession of marihuana, but only as *authorizing it.*[12] Appellant's argument is, therefore, untenable,

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[12] Pertinent parts of the judge's instructions to the jury on this question are quoted as follows:

> "Now, I instruct you, ladies and gentlemen, that this defendant, as is true of every defendant brought to trial in this court, is presumed at the outset to be innocent.
>
> "The defendant starts off with a clean slate, and by pleading 'Not Guilty,' as he has done here, has imposed upon the Government to prove his guilt to you beyond a reasonable doubt.
>
> "By the term 'reasonable doubt' as I use it here, is meant such a doubt as may arise in your minds when, after fully and impartially considering all of the evidence, the jurors do not feel satisfied to a moral certainty of the accused's guilt.
>
> "A 'reasonable doubt' does not mean a mere possible or imaginary doubt or a mere conjecture; a 'reasonable doubt' is one which appeals to and is based upon your reason.
>
> "If after fully and impartially considering all of the evidence you have a reasonable doubt as to the guilt of the defendant, it's your duty to acquit.

especially since he did in fact testify that he knew that his actions were contrary to the laws of the United States.

"On the other hand, if after fully and impartially considering all of the evidence you are convinced beyond a reasonable doubt of the guilt, then it's your duty to convict." (R. 591, 592.)

* * *

"Now, I want to read the statutes to you which the defendant is alleged to have violated.

"Section 176(a) of Title 21 of the United States Code, in pertinent part, reads as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced—

"Now, that has to do with Count 1, which I am withdrawing from your consideration.

". . . or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute thereafter provides.

"With the further paragraph:

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"What that means, of course, is this:

"If the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana which he had.

"The other statute alleged to have been violated is 4744(a)(2) of Title 26 of the Code, reading in pertinent part as follows:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4744(a)(1) to acquire or otherwise obtain any marihuana without having

Appellant contends that the closing arguments to the jury by Government counsel far exceeded the bounds of fair comment, invited prejudice based on educational, eco-

paid such tax or, to—and this is the part that we are interested in—to transport or conceal or in any manner facilitate the transportation or concealment of any marihuana so acquired or obtained. Proof that any person shall have in his possession any marihuana and shall have failed after reasonable notice and demand by the Secretary or his delegate to produce the order form required by Section 4742 to be retained by him, shall be presumptive evidence of guilt under this subsection." (R. 595-598.)

* * *

"And the statute which I have read to you with regard to this third count provides that failure to produce the order form shall be presumptive evidence of guilt under this subsection.

"Now, you might have some difficulty with the question on Count 2 by reason of the fact that the statute requires that the defendant receive—by reason of the fact that the statute provides that one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute provides.

"The Government is entitled to rely upon the presumption which I read to you earlier; that is, whenever on trial for a violation of this sub-section the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.

"I mention this a second time because you might be confused about the question of importation.

"We are not talking necessarily about the importation or what the Government contends was importation here at the bridge.

"The defendant has told us that he received the marihuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally and that he knew it had been imported illegally unless he explains his possession to the satisfaction of the jury." (R. 608-610.)

nomic and regional differences between the accused and the jurors, expressed strong hostility toward him, asserted that he was irresponsible regarding his child's welfare, attacked him for offering a religious defense, bolstered a witness' credibility and generally inflamed the jury's emotions, amounting to plain and reversible error. Pertinent parts of the arguments to which objections were made are set forth more fully in the margin below,[18] but they refer

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[18] The following is taken from the final argument of Government counsel to the jury:

> "And all this other stuff, I submit, is just hogwash. It's just an attempt to come down here to Laredo, Texas and get a federal jury to believe that because he has got a Ph. D and because he has got a 3,000-acre mansion in Upper New York where they experiment all the time, that he is not subject to the laws of the United States of America.
>
> "And I say to you respectfully and sincerely that it not but hogwash, that Dr. Leary, like everybody else, high, low, black, white—any color—are subject to the laws equally, of the United States. That is one thing that we have that many people in the world do not have. We have a country of law. We are governed by law and we all are subject to the same rules, rich, poor, race, creed or color—makes no difference. The law applies equally to everyone, to all citizens. And that is one great thing about our country." (R. 545, 546.)
>
> * * *
>
> "But after hearing this testimony for several days I don't think there can be any serious question about the fact that this business about psychedelics is not in the encyclopedias and it appears that there has nothing ever been written in print about it except things that he was connected with. This is a hoax and we respectfully submit that they tried to come down here and put off on a good jury of Laredo people a colossal hoax." (R. 551.)
>
> * * *
>
> "To say that this was an unusual case would be a gross understatement, and to say that it's an important case would be a gross understatement, because, ladies and gentlemen, I have participated in what I feel is a considerable number of criminal cases and I cannot remember a case that I have felt more strongly about than I have this case, and I will tell you why:" (R. 578.)
>
> * * *

principally to the prosecutor's statements that appellant was "irresponsible" (especially with reference to the welfare of his children), his defense was a "colossal hoax," "just hogwash," to Government counsel's statement that "I cannot remember a case I have felt more strongly about than I have this case," and his further statement that "I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself."

The only semblance of an objection made by defense counsel was that related to Government counsel's reference to defendant's alleged irresponsibility in raising his children. Government counsel stated:

> "What kind of a man are you dealing with? What kind of a man do you have before you here today?
>
> "You have a man that says, 'I believe in bringing up my children the old-fashioned way,' and the 'old-fashioned way' ladies and gentlemen, is to expose them to marihuana, expose them to these other drugs that he has no right to dispense. And that is what we have here.
>
> "Is that irresponsibility?
>
> "I can think of no—no other situation that it can be more irresponsible.
>
> "Mr. Fitzgibbon: If your Honor please. I thought on the question of religion we weren't going to talk on it.
>
> "The Court: Religion?
>
> "Mr. Fitzgibbon: The right to bring up our children." (R. 581, 582.)

The matter was not further pursued by Mr. Fitzgibbon, defense counsel.

Government counsel also stated:

> "But what does he do when he is finally exposed and they find out about it?
>
> "He makes a joke about it. Now, I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself, and I hope that you will forgive me." (R. 585, 586.)

No error is seen in the reference in argument of government counsel to the witness, Cutler, that "there is no reason to disbelieve this man—no motivation for him to falsify or no bad feelings toward Dr. Leary." We discuss the credibility of Cutler and the attempt to impeach him later in this opinion.

The record discloses that no objection to the remarks of the prosecution was made by the several defense counsel either during or after the argument. The issue was, therefore, waived at the time of trial by the defense. See *Fogarty* v. *United States*, 5 Cir., 1959, 263 F. 2d 201, cert. den. 360 U.S. 919, 79 S. Ct. 1437, 3 L. Ed. 2d 1534; *Van Nattan* v. *United States*, 10 Cir., 1966, 357 F. 2d 161; *United States* v. *Sawyer*, 4 Cir., 1965, 347 F. 2d 372; *United States* v. *Aadal*, 2 Cir., 1966, 368 F. 2d 962.

Judging the case from the viewpoint that most of the evidence which incriminated the accused was admitted and confirmed by him, some resort to emphatic and forceful expression by Government counsel was to be expected. Though the court declined to give the specific charge to the jury requested by appellant that it should acquit appellant if it found his religious claims to be honest and in good faith, it nevertheless permitted Dr. Leary to present his claims fully with reference to his religious and scientific beliefs and to support them with corroborating witnesses. The sincerity of the accused was undoubtedly at issue, and especially his credibility with reference to the possession of marihuana while the defendant was crossing the international border at Laredo. We discern no personal hostility by the prosecution toward the defendant. Though Government counsel's summation of the case at times was strong, a fair reading of the entire argument, taken with the strong evidence of the defendant's guilt largely shown by his own admissions, does not convince us that there was plain error or abuse which affected defendant's substantial right to a fair trial or would justify reversal. Fed. R. Crim. P., Rule 52. That the defendant's teenage daughter was exposed to a home where the free use of marihuana by the family and inhabitants of the household (said to be for religious and scientific purposes) was regular, even routine—but nevertheless in violation of the laws of the country—also permitted the prosecutor more leeway in final argument than might be expected under ordinary circum-

stances, and we are unable to say that zeal overcame fairness.[14]

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[14] The following excerpt from the testimony while Dr. Leary was being interrogated by his counsel (Mr. Fitzgibbon) rather clearly indicates the common use of marihuana in the home and by the family of Dr. Leary:

"Q (By Mr. Fitzgibbon) Now, at home in Millbrook you stated that you used marihuana in the practice of your religion.

Do members of your family share this practice and belief with you? A You mean do they smoke marihuana?

"Q Yes.

"The Court: Is that what you are asking him?

"Mr. Fitzgibbon: No, sir. If your Honor please—strike that.

"Q (By Mr. Fitzgibbon) I just have one question about your family here.

Does marihuana play an integral part in your family life in the bringing up of your children—in the raising of your children?

Just answer that yes or no. A. Well, the use of psychedelic drugs does.

* * *

"The Court: Well, I believe he may explain. He is apparently having some difficulty making a categorical answer.

"A (Continuing) You see, I can't explain why it's difficult for me to answer because—

"The Court: I think counsel is interested in the part marihuana plays in your family life.

Is that what you are asking him?

"Mr. Fitzgibbon: Yes, your Honor.

"The Court: You may tell us if you wish.

"Q (By Mr. Fitzgibbon) We have discussed the science, we have discussed the religion and we have discussed the family.

Now, the family life— A Well, I would like to try to make —use two or three sentences to do this, because I am talking about a period of over six years in which the use of marihuana has been somewhat recent.

"Q Yes, sir. A Since 1960, since I started working through these experiences, most of the experiences that I was involved in were in my own home. The door of my home has never been locked and no room in my home has ever been locked. Hundreds and hundreds of psychedelic planned drug sessions have been run in my home. My children have always lived with me in my home.

Defense counsel attempted to impeach a Government witness, Cutler, who testified on direct examination that he

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From the very beginning of this work I felt that this was a natural, personal, if you will, sacred experience that was not to be secret or behind doors. I couldn't bring—I had to have this—my children be open to this, to see what was going on. My children have walked in the room during perhaps hundreds of psychedelic drug sessions with religious leaders and with philosophers and so forth, in my home.

When we were in Mexico on two occasions, we were doing research with primitive people. My children were with me. So that the use of psychedelic drugs is—and the discussion and the debates about how to use them—this is going on 24 hours a day in my home, so that the integral, central, almost exclusive part of our home life is centered on these spiritual and psychological activities.

"The Court: If I understand you, then, your children have observed and seen what is going on but have not participated? Is that a fair statement?

"The Witness: Yes, sir.

And I also wanted to make the point that marihuana was of a more recent addition and played a minor, but real part, in the last year.

"Q (By Mr. Fitzgibbon) you then think it's an important part of your role as a father to expose, I might say—use the term 'expose' your children to these scientific, psychedelic experiences? A. Yes, sir.

"Q . . . And let them see how religion is carried on in their home? A. Not just religion. It's a way of life. I am very old fashioned about bringing up children. I think that it's the home that determines the child, that the idea of sending your child out to some strangers to be educated—I believe the child should learn his father's trade, if possible or if he wants to, and that he should learn—both the religious and the philosophic and the way of life of his parents so that—

"Q Well, do you believe, then, that every person should have a right to raise their children as they believe? A I think that is one of the inalienable rights, not only of our Government but a God-given right to raise your children as best your conscience and your ignorance or wisdom has led you to believe.

"Q The way that you are raising your children at the present time, do you believe that you are raising them according to your beliefs, that you have a right to do so? A I do." (R. 305-309).

had attended a social gathering at Greenwich Village; that Dr. Leary had smoked marihuana at this party, which event occurred prior to the time which Dr. Leary admitted first using the drug. On cross-examination, counsel for the defense asked the witness, "How may times have you been picked up for smoking marihuana?" The question was an attempt to establish a criminal record of the witness and admittedly was asked to impeach his credibility.[15] The court properly sustained Government counsel's objection. Generally, only prior convictions of felonies or of misdemeanors involving moral turpitude are admissible in evidence for the purpose of impeachment of the credibility of a witness. *Roberson* v. *United States,* 5 Cir., 1957, 249 F. 2d 737; *Ramirez* v. *United States,* 9 Cir., 1961, 294 F. 2d 277; *Homan* v. *United States,* 8 Cir. 1960, 279 F. 2d 767, cert. den. 364 U.S. 866, 81 S. Ct. 110, 5 L. Ed. 2d 88 (1960); *Beasley* v. *United States,* D.C. Cir., 1954, 218 F. 2d 366, cert. den. 349 U.S. 907, 75 S. Ct. 584, 99 L. Ed. 1243 (1955);

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[15] The record reveals the cross-examination by Mr. Fitzgibbon for the defense of the witness, Cutler, on this issue as follows:

"And, of course, you were paid by the Government to come down here, were you not? A I wasn't paid by the Government to come down here. My expenses were paid, yes.

"Q Well, it's somewhat of an equivocation. Your expenses were paid to come down? A Yes. But I am receiving no salary or anything like that.

"Q You receive a certain amount of money per day, do you not? A Yes. I believe so.

"Q So you are being paid, then?

Now, what—how many times have you been picked up for smoking marihuana?

"Mr. Susman: We object to that, your Honor.

"The Court: Are you undertaking to impeach the credibility of the witness? If you are, you may prove it by a prior conviction of felony.

"Mr. Fitzgibbon: Yes, your Honor.

"Q (By Mr. Fitzgibbon) Have you been convicted of a felony in this state or any other state? A No. I have not.

"Q You have not?

"Mr. Fitzgibbon: Pass the witness." (R. 461, 462.)

United States v. *Bell*, 6 Cir., 1965, 351 F. 2d 868. The trial court has wide discretion to limit cross-examination, *Roberson* v. *United States, supra,* and the exercise of such discretion should not be interfered with in the absence of a showing of prejudice to the defendant. *Alderman* v. *United States,* 5 Cir., 1929, 31 F. 2d 499; *Foster* v. *United States,* 10 Cir., 1960, 282 F. 2d 222. We ascribe no prejudice to the court's ruling. The jury was free to accept or reject the witness' testimony on this peripheral issue and was so instructed by the court. Cutler was not a major witness, though he was used by the prosecution on rebuttal to impeach Dr. Leary's testimony as to when he first began using marihuana. It is most unlikely that Cutler's statement had any substantial effect on the verdict in view of the defendant's own tsetimony that he frequently used marihuana, knowing it to be illegal, even if such use was purportedly for scientific or religious purposes.

Now, for the first time, on appeal, appellant states that Cutler was, at the time of trial when he testified, under indictment in the United States Court, Southern District of California, for smuggling marihuana into the United States from Mexico, and for bail jumping in connection with this charge; that this fact was known to the Government and not disclosed to Dr. Leary's counsel. The Government's answer is that Cutler had no prior convictions, had not been tried as yet on the California federal cases, and that if defense counsel had asked for this information it would have been given. We observe that the pending charges against Cutler are in no way connected with the present case, and that no attempt was made by counsel at the trial to go into any relationship between the witness and the prosecution which might have reflected on his credibility, except to show that the Government paid his expenses to come to Laredo to testify. There was obviously no suppression by the Government of Cutler's criminal record for there were no convictions against him when he testified, nor did the pending cases in California relate in any way to the present prosecution. The contention is without merit.

Appellant contends that the presumption under 21 U.S.C. § 176a, that marihuana is illegally imported and that a possessor has knowledge of illegal importation, is arbitrary and irrational in view of his contention that a high proportion of marihuana in the United States is domestically grown. To prove his point he has compiled certain statistics in published annual reports of the Bureau of Narcotics, 1957-1964, inclusive. This proof was not offered at the trial of the case and we assume we are asked to take judicial cognizance of information found in these public reports. By process of reasoning, appellant's counsel states that of all the marihuana in the United States well over 99 per cent has been domestically grown. Of course, the Bureau of Narcotics reports make no such statement and we are not impressed that it is correct. Obviously the information found in appellant's brief is incomplete for undoubtedly much marihuana from outside the United States does reach this country. Appellant does not purport to tell us what this amount is or to estimate it beyond his own rationalization of certain statistics he has assembled from published reports. No reference is made to seizures by state authorities nor is any provision suggested for the amount of marihuana which comes into the United States undetected. In other published reports which are equally available to the Court as are the Bureau of Narcotics annual reports relied on by appellant, United States Commissioner of Narcotics, Henry L. Giordano, testified before the House of Representatives Subcommittee of the Committee on Appropriations, on February 8, 1967, that "most of our marihuana comes from Mexico."[16] This official statement, which is in direct

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[16] See Extracts from Treasury-Post Office Departments and Executive Office Appropriations for 1968, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 90th Cong., 1st Sess., p. 457, testimony of Mr. Giordano: "One of the problems, of course, is that most of our marihuana comes from Mexico. It is quite easy to smuggle it across the border and distribute it."

contradiction to the conclusions in exhibits prepared by appellant's counsel, shows rather well that appellant's information, submitted for the first time on brief, and not the subject of proof contradictorily at trial, is neither complete nor convincing.

In *Caudillo* v. *United States*, 9 Cir., 1958, 253 F. 2d 513, the Ninth Circuit upheld the constitutionality of the presumption in 21 U.S.C. § 176a, that marihuana is illegally imported and the possessor has knowledge of importation.[17] The court noted the necessity under the requirements of *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), of rational connection between the facts proved and the ultimate fact presumed, and said:

> "Though there might be differences of opinion, it can reasonably be argued that the facts of marihuana importation are so well-known, particularly to marihuana users, that there is a 'rational connection between the fact proved and the ultimate fact presumed.'"

The Ninth Circuit in *Caudillo* also pointed out, "The statutory language in question has long existed in the narcotic laws" and was upheld by the Supreme Court

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See also statement of Mr. Giordano, United States Commissioner of Narcotics at Hearings of the Special Senate Subcommittee on Narcotics of the Committee on the Judiciary, June 14, 1966, relative to the Narcotic Rehabilitation Act of 1966, in pertinent part as follows: "Large quantities of marihuana grown illicitly in Mexico are smuggled across the border into the United States. Although marihuana grown in the United States is occasionally found in the traffic, the Mexican variety, preferred by users, is most prevalent in the United States marihuana traffic."

[17] See also *Borne v. United States*, 5 Cir., 1964, 332 F. 2d 565; *Claypole v. United States*, 9 Cir., 1960, 280 F. 2d 768; Brown, *The Constitutionality of Statutory Criminal Presumptions, Modern Practice Commentator*, Vol. V, No. 1, p. 92, May 1967. Cf. *Maltos-Roque v. United States*, No. 23995, 5 Cir., decided July 12, 1967, . . . F. 2d. . . .

in *Yee Hem* v. *United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925), in reference to opium. The court said that as to marihuana, "If experience is the test of the validity of an inference, then the legislatively created inference in this case is well supported." 253 F. 2d at 517.

We believe, as was expressed so well in *United States* v. *Gainey*, 380 U.S. 63, 67, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965):

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."

That being true, and with the benefit of the legislative history to which we have already referred, it is clear that the experience of Congress shows that it is gravely concerned with the smuggling, transportation, concealment and possession of imported marihuana. When Congress passed the Marihuana Tax Act of 1937 from which are derived certain provisions of the United States Code involved here, i. e., 26 U.S.C. §§ 4741, 4742, and 4744, extensive Congressional hearings preceded the passage of the Act. They are referred to in appellant's brief as Hearings before the Committee on Ways and Means, 75th Cong., 1st Sess., H. R. 6385 (1937). The report of the proceedings shows unmistakably that Congress intended "to discourage the current and widespread undesirable use of marihuana," and that the development of a scheme of taxation would "render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses." Witnesses referred to the "injurious effect it has upon the public health and morals of this country," especially for younger

people who are attracted to it. The then Commissioner of Narcotics, Mr. Anslinger, said, "This drug is entirely the monster Hyde, the harmful effect of which cannot be measured." He pointed out that all of the states had passed laws against marihuana. Numerous expert witnesses referred to the dangerous nature of the drug, its effect on those who use it, to criminal episodes of terrible character which accompanied its use. The evidence was voluminous and convincing that marihuana is a serious evil to society. Thus did Congress wisely and prudently enact this law and clearly meet the "compelling state interest" test imposed in *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).[18]

Appellant contends that 26 U.S.C. § 4741(a), which imposes a tax on all transfers of marihuana, and 26 U.S.C. § 4742, which requires that such transfers be accompanied by written order forms issued by the Secretary of the Treasury, are unconstitutional in that they violate the Fifth Amendment privilege against compulsory self-incrimination. He argues, therefore, that his conviction under Count 3, which charged that defendant transported and concealed marihuana, being a transferee required to pay a transfer tax, in violation of 26 U.S.C. § 4744(a), is invalid. This Circuit has had occasion to rule on this precise point in *Haynes* v. *United States*, 5 Cir., 1964, 339 F. 2d 30, cert. den. 380 U. S. 924, 85 S. Ct. 926 (1965), in which the court found no merit to the contention "that the appellant was required to incriminate himself by registration and pay-

[18] See also additional legislative history supporting the propriety of anti-marihuana enactments by Congress: 1956 U. S. Code, Cong. & Adm. News, p. 3274, relative to the Narcotic Control Act of 1956 (when the legislative presumption was included which made the unexplained possession of marihuana by the defendant sufficient evidence for conviction); 1951 U. S. Code, Cong. & Adm. News, p. 2602, in which the Narcotic Drugs Import & Export Act and the Internal Revenue laws relative to narcotics was amended in order to provide greater uniformity of penalties for violations of those laws.

ment of taxes and, hence, that the statutes under which he was convicted are unconstitutional . . . ."[19]

We find, without merit, appellant's final point of error that the District Court erred in refusing to instruct the jury that they could consider as a defense to Count 2 defendant's honest and sincere belief that he had a right to possess marihuana in violation of the law because of his religious and scientific beliefs. Appellant argues that the jury could have found, if so instructed by the court, that this belief negated the specific intent necessary under 21 U.S.C. § 176a. This point is in effect substantially similar to those contentions of appellant which we have already considered and rejected relating to the defense of religious claims that appellant was honest and in good faith in his use of marihuana, and to the contention that the presumption in Section 176a that possession of marihuana is sufficient evidence to authorize conviction unless explained by the defendant to the satisfaction of the jury is unconstitutional.

AFFIRMED.

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[19] See also *Rule v. United States*, 5 Cir., 1966, 362 F. 2d 215, which upheld the constitutionality of 21 U.S.C. § 176a against an attack that the statute violated the Fifth Amendment privilege against self-incrimination; *Manning v. United States*, 5 Cir., 1960, 274 F. 2d 926, which upheld the constitutionality of the presumption in 26 U.S.C. § 4744(a) of guilt in failing to pay the transfer tax on marihuana (which presumption arises from failure to produce the required order forms) against an attack that due process had been violated; *Palma v. United States*, 5 Cir., 1958, 261 F. 2d 93, which upheld the constitutionality of 18 U.S.C. § 1407—which statute requires that a United States citizen, who has been convicted of violating a narcotics law under certain circumstances, register prior to departure from or entry into the United States—against attacks of unreasonable search and seizure under the Fourth Amendment, self-incrimination, lack of due process, vague and indefinite standards and restraint of civil liberty, under the Fifth Amendment, and cruel and unusual punishment under the Eighth Amendment; and *Reyes v. United States*, 9 Cir., 1958, 258 F. 2d 774, which upheld the constitutionality of the same statute, 18 U.S.C. § 1407.

APPENDIX B

Opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

(March 29, 1968)

On Petition for Rehearing En Banc

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

In a supplementary petition for rehearing, appellant calls attention to three recent Supreme Court decisions rendered on January 29, 1968 (subsequent to our original opinion in this case, 383 F. 2d 851), in *Marchetti v. United States*, — U. S. —, — S. Ct. —; *Grosso v. United States*, — U. S. —, — S. Ct. —; and *Haynes v. United States*, — U. S. —, — S. Ct. —, and makes the contention that because of these holdings his conviction must be reversed on Count 3 of the indictment, which charged the transportation of marihuana as a transferee without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury required by statute. See 26 U.S.C. §§ 4741(a), 4742, 4744(a). Appellant's position is that the statutory provisions referred to violate the Fifth Amendment privilege against self-incrimination, and that though this contention was rejected by us in our original opinion, the new rulings of the Supreme Court in *Marchetti*, *Grosso* and *Haynes* now compel a holding that the conviction on Count 3 is invalid because it is based on unconstitutional statutory provisions. From this it is contended that the arguments made and charge to the jury relating to Count 3 matters have necessarily prejudiced appellant's entire case, including his defense to Count 2, which charged a violation of 21 U.S.C. § 176a in transporting and facilitating the transportation and concealment of marihuana.

The Supreme Court set aside the conviction in *Marchetti*, which charged violations of the Federal Wagering Tax Statutes for evading payment of the annual occupational tax imposed by 26 U.S.C. § 4411 and for wilfully failing to register before engaging in the business of accepting wagers, as required by 26 U.S.C. § 4412. In *Grosso*, the conviction for wilful failure to pay the excise tax on wagering imposed by 26 U.S.C. § 4401, and for failure to pay the special occupational tax imposed by 26 U.S.C. § 4411, was reversed. In *Haynes*, the conviction for

violating 26 U.S.C. § 5851 in knowingly possessing a firearm, as defined by 26 U.S.C. § 5848(1), which had not been registered with the Secretary of the Treasury, as required by 26 U.S.C. § 5841, was reversed.

Appellant thus contends that these new Supreme Court decisions now require a reversal of the Count 3 conviction in that the appellant's transportation of marihuana, without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury, is analogous to the statutory provisions relative to possessing an unregistered firearm referred to in *Haynes*, and to the statutory provisions relating to registration and occupational tax in connection with wagering activities referred to in *Marchetti* and *Grosso*. Appellant argues that the federal statutory provisions relating to marihuana, of which he stands convicted, thus penalize an individual's refusal so to incriminate himself.

We disagree with appellant's contentions because we believe the holdings in *Marchetti*, *Grosso* and *Haynes* are clearly distinguishable from the instant case.

The United States points out in its response to appellant's supplementary petition for rehearing that the statutes involved in the new Supreme Court cases differ from the marihuana statutes here in that under the former there are no licensing provisions and activities thereunder are always unlawful. The possession of marihuana, however, is not per se a crime. Under the law of Texas where the crime was committed, marihuana may be lawfully possessed under the law of that state by pharmacists, physicians and others. See Vernon's Texas Penal Code Art. 725b. The same is true under federal statutes where marihuana may be lawfully possessed. See 26 U.S.C. §§ 4741-4757 and 4771-4775. See also *United States v. Sanchez*, 340 U. S. 42, 71 S. Ct. 108 (1950).

In *Marchetti*, the Supreme Court also said (— U. S. —):

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally im-

permissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes."

Here, appellant took the stand and affirmatively waived the privilege against self-incrimination by testifying fully to the details of his acquisition and transportation of marihuana without having paid the tax or having secured the Treasury written order forms.

We reaffirm our prior ruling on this issue (based on several former decisions of this Court, namely, *Haynes v. United States*, 5 Cir., 1964, 339 F. 2d 30, cert. denied, 380 U. S. 924, 85 S. Ct. 926 (1965); *Rule v. United States*, 5 Cir., 1966, 362 F. 2d 215; and *Manning v. United States*, 5 Cir., 1960, 274 F. 2d 926) that the statutory provisions relating to marihuana (26 U.S.C. §§ 4741(a), 4742 and 4744(a)) which require that transfers of marihuana be accompanied by written order forms issued by the Secretary of the Treasury, in payment of the transfer tax, are not unconstitutionally violative of the Fifth Amendment privilege against compulsory self-incrimination.

Appellant's other contentions in his petition for rehearing have been fully considered and are amply discussed and disposed of in our original opinion.

Rehearing DENIED; rehearing en banc DENIED.

APPENDIX C

Judgment of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1966

No. 23570

D. C. Docket No. 66-L-37 Cr.

TIMOTHY LEARY,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

September 29, 1967

Issued as Mandate: April 8, 1968

APPENDIX D

Constitutional and Statutory Provisions Involved

21 United States Code § 176:

". . . whoever, knowingly, with intent to defraud the United States . . . in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . ."

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

26 United States Code § 4741:

"(a) Rate—. . . .

"(2) Transfer to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

"(b) By whom paid.—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form."

26 United States Code § 4742:

"(a) General requirement.—It shall be unlawful for any person . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate. . . ."

26 United States Code § 4744:

"(a) Persons in general.—it shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) (1) to acquire or otherwise obtain any marihuana without having paid such tax, or (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

Amendment I to the Constitution of the United States of America:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V to the Constitution of the United States of America:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

Correspondence Between the United States Attorney and Counsel for Petitioner

United States Department of Justice
UNITED STATES ATTORNEY
Southern District of Texas
P. O. Box 61129
Houston, Texas—77061

November 25, 1966

AIR MAIL

In Replying Please Refer
To This File Number: 661002
Professor Joel Jay Finer
2500 Red River Street
Austin, Texas 78705

Re: Leary v. United States
No. 23570—Fifth Circuit
Court of Appeals

Dear Professor:

I have for reply your letter dated November 21, 1966, concerning the referenced cause.

Information in our file indicates that the witness Raymond C. Cutler is the same person as Raymond Christopher Cutler.

Before Cutler testified in Laredo, he was interviewed by me and I specifically asked him about prior convictions which he denied. Cutler did admit to me (consistent with a statement given to Customs) that he had charges against him involving marihuana in California. Cutler was quite definite in stating that he had not pleaded guilty or been tried for any such offense, however. We have no information to the contrary and I do not know even at the present

time whether or not Cutler has ever been convicted of these or any other charges.

I do not recall either before, during or after the trial any inquiry by you or any other defense counsel for any information concerning Cutler. Thus, I am at a loss to understand your statement that we refused to disclose matters concerning Cutler. If we were asked by any counsel concerning Cutler's record, I would have gladly given the information. Also, the information could have been obtained by counsel during the trial under well known procedures with which you undoubtedly are more familiar than I.

(18 U.S.C. 3500).

Concerning your statement that the prosecution attempted to obstruct defense counsel's efforts on cross-examination I can only comment that reading the record shows that we only made one objection during the entire cross-examination which is reported at page 462. In that regard I know of no basis to impeach a witness in the manner attempted by Mr. Fitzgibbon and it seems to me that the objection was proper. As a matter of fact, we affirmatively agreed to more than one cross-examination of Cutler, including a change of counsel, in spite of the usual rule against that practice. I hardly think that our tactics can be classified as obstructive.

It was made abundantly clear to the jury that Cutler used not only marihuana but also LSD. It seems to me that Cutler's own admissions as to these behavioral abnormalities would affect his credibility in a much greater respect than a mere arrest on a marihuana charge. In any event, Cutler's true nature was presented to the jury so that they were able to evaluate fully the credibility, if any, to be given his testimony.

I trust that this is a full and complete answer to your letter but if it is not, I should be happy to respond further.

Sincerely,

/s/ MORTON L. SUSMAN
United States Attorney

MLS:fd

2500 Red River Street
Austin, Texas
November 21, 1966

Honorable Morton L. Susman
Ronald J. Blask, Esq.
James Gough, Esq.
Office of the United States Attorney
Federal Courthouse
Houston, Texas

Re: Timothy Leary
vs.
United States, No. 23570
U.S. Court of Appeals

Gentlemen:

As counsel for appellant in above entitled case, I am presenting an argument to the United States Court of Appeals based on my conclusion that the Raymond C. Cutler who testified at trial is the same person as the Raymond Christopher Cutler who was indicted in the United States District Court for the Southern District of California (No. 33291—Criminal) on August 5, 1964, for smuggling approximately twenty-five pounds of marihuana and fifty Dexedrine capsules into the United States from Mexico, and was indicted on September 30, 1964 in the same Court (No. 33505—CBS) for bail jumping in connection with the smuggling charge, and was the object of bench warrants issued for his arrest by the same Court on July 6, 1965 at least

one of which was in full force and effect on the day he testified at the trial of Dr. Leary.

In addition to the identity of first and last names and middle initials, and Mr. Cutler's testimony that he had used marihuana, personal investigation and corroborative hearsay have convinced me that the witness Cutler, and the Cutler whose record I have indicated are one and the same man. However, I am somewhat hesitant about presenting an argument critical of the prosecution's behavior premised on that conclusion, without being as certain as I can be of its validity. To be perfectly candid, and to avoid any suggestion of entrapment or lack of fair dealing, I now inform you that my argument alleges that the prosecution knew or should have known of Cutler's record and that it denied my client a fair trial in refusing to disclose it, in bolstering Cutler's credibility in closing arguments, and in obstructing defense counsel's efforts on cross-examination of Cutler. By this letter I am requesting that you inform me, as soon as possible, if my conclusion about the witness Cutler's record is not substantially correct. In the exercise of my duty to my client, I feel obliged to record your answer, or lack thereof in my brief.

Please call me as soon as possible, prior to November 28, 1966, at either AC 512—GR 1-5151 or AC 512—GR 7-4683, following the call with a letter to me at 2500 Red River Street, Austin, Texas 78705.

I trust and hope that our relations will remain cordial and that you will understand that I can do no less for my client.

Best regards,

Sincerely yours,

Joel Jay Finer
Counsel for Dr. Timothy Leary

JJF:ahs